IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDWARD M. MATOS, Appellant.	No. 37188-0-II UNPUBLISHED OPINION

Armstrong, J.—Edward Matos appeals his convictions of possession of marijuana and third degree assault, arguing that the trial court erroneously sentenced him to a term above the statutory maximum on the assault conviction. He also argues that his counsel was ineffective for (1) failing to move to suppress evidence found in the trunk of the vehicle Matos drove and (2) failing to move for a mistrial or propose a curative instruction after a police officer testified that Matos intentionally ran into him. Finally, Matos argues that the State failed to prove that he possessed marijuana. We affirm the convictions but remand for the trial court to clarify the maximum length of the sentence.

FACTS

Early in the morning of August 17, 2007, Deputy Malcom McIver witnessed a vehicle

driven by Edward M. Matos speed out of a tavern parking lot and make an illegal turn. Deputy McIver, in full uniform and in a marked vehicle, began following the vehicle, which made a series of turns without signaling. Deputy McIver turned on his emergency lights and siren, but Matos did not stop. In fact, Matos increased his speed, ran through a stop sign, nearly caused another vehicle to crash, drove into oncoming lanes, and finally turned into a parking lot. Deputy Rod Ditrich arrived to assist in the pursuit. Matos and another man exited the vehicle and started running while the vehicle was still moving. As Deputy Ditrich tried to deploy his tazer, Matos lowered his head and shoulders and ran into Deputy Ditrich, injuring him. The officers arrested Matos and found eight oxycodone pills and $1,000 cash in his pockets. Deputy Ditrich placed Matos in the back of Deputy McIver's vehicle, where Matos kicked the back driver's side window out of its frame. Meanwhile, Deputy McIver inventoried the contents of the vehicle before towing it away; in the trunk, he discovered a bag containing 39.1 grams of marijuana. Matos was not the registered owner of the vehicle.

The State charged Matos with third degree malicious mischief, third degree assault, attempting to elude a pursuing police vehicle, unlawful possession of marijuana with intent to deliver, and unlawful possession of oxycodone.

During trial, Matos's counsel objected twice during the testimony of Deputy Ditrich:

> [WITNESS]: The defendant lowered his head and his shoulders, kind of like a football player would if he was going to tackle somebody, and *intentionally* ran right into me.
> [DEFENSE]: Objection, Your Honor, to the witness characterizing my client's intent.
> [THE COURT]: Characterizing your client as what?
> [DEFENSE]: If we could approach sidebar.
> [PROSECUTION]: Your honor, I think that I can ask a clarifying question[].
> [THE COURT]: Rephrase the question.

> . . .
> [PROSECUTION]: . . . Can you pick it up there and describe exactly how the defendant postured himself?
> [WITNESS]: He ran around the car. . . . As he saw me, he *intentionally* lowered his shoulder and his head.
> [DEFENSE]: Objection to what my client intentionally did. Calls for speculation.
> [PROSECUTION]: Just describe what he did rather than what he intended to do.

Report of Proceedings (RP) at 77-79 (emphasis added).

The jury acquitted Matos of unlawful possession of marijuana with intent to deliver, but found him guilty on all the other charges, including the alternative charge of unlawful possession of marijuana under 40 grams. At sentencing, the court imposed 57 months of confinement and an additional 9 to 18 months in community custody.

ANALYSIS

I. Sentencing

Matos contends that the trial court erred in imposing a sentence that exceeds the statutory maximum of five years for his third degree assault conviction. The State concedes that the sentence imposed could exceed the statutory maximum and that we should remand to the trial court for clarification of the judgment and sentence.

"[A] court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime. . . ." RCW 9.94A.505(5). Where a court sentences a defendant to the statutory maximum and additional community custody, the judgment and sentence should set forth the statutory maximum and ensure that the period of incarceration term together with the community custody time does not exceed that term. *State v. Vant*, 145 Wn. App. 592, 605-06, 186 P.3d

1149 (2008) (citing *State v. Sloan*, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004)).

The statutory maximum sentence for Matos's third degree assault conviction is 60 months imprisonment. RCW 9A.36.031(2); RCW 9A.20.021(1)(c). The trial court sentenced Matos to 57 months imprisonment and an additional 9 to 18 months in community custody. If Matos does not earn early release credits while serving his sentence, his sentence will exceed the 60-month statutory maximum. On the other hand, Matos may earn early release credits and begin community custody well before he reaches the statutory maximum. Accordingly, we remand for the trial court to ensure on the judgment and sentence that Matos's incarceration time together with his community custody time does not exceed the statutory maximum. *See Vant*, 145 Wn. App. at 605.

II. Admission of Marijuana Evidence

Matos argues next that the trial court erred in admitting the marijuana evidence because the State did not make a showing of "manifest necessity" to search the trunk of his vehicle. Br. of Appellant at 11. Matos did not raise this issue at trial, so he has waived it on appeal. RAP 2.5(a). Matos does, however, argue that his counsel ineffectively represented him by failing to move to suppress the marijuana, a constitutional issue that he may raise for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007) (citing *State v. Greff*, 141 Wn.2d 910, 925, 10 P.3d 390 (2000)).

III. Ineffective Assistance of Counsel

Matos maintains that he was prejudiced because his counsel (1) did not move to suppress evidence of the marijuana seized in the trunk and (2) mishandled the objections to Deputy

Ditrich's testimony that Matos intentionally ran into him; Matos reasons that his counsel should have requested a curative instruction or moved for a mistrial. He also argues that Deputy Ditrich's testimony was prejudicial and denied him a fair trial.

Both the federal and state constitutions guarantee criminal defendants effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend VI; Wash. Const. art. I, § 22. To prove that counsel ineffectively represented him, Matos must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced him. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (citations omitted). Counsel's representation is deficient when it falls below an objective standard of reasonableness. *Hicks*, 163 Wn.2d at 486 (citations omitted). The defendant is prejudiced when, but for the deficient representation, there is a reasonable probability that the trial outcome would have differed. *Hicks*, 163 Wn.2d at 486 (quoting *Strickland*, 466 U.S. at 687). We defer to trial counsel's strategic decisions and begin our analysis by presuming that counsel was effective. *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

A. Failure to Move to Suppress

Matos asserts that counsel should have moved to suppress the marijuana evidence because the arresting officers did not show "manifest necessity" to search the trunk of the vehicle. Br. of Appellant at 11.

Inventory searches are an exception to the general rule that warrantless searches are unreasonable per se. *State v. White*, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998). RCW 46.55.113(2)(d) authorizes police officers to impound vehicles where the driver has been arrested

and taken into custody. When they do so, RCW 46.55.075 requires the officers to inventory the vehicle and complete an inventory form. Here, Deputy McIver had authority to conduct an inventory search when he discovered the marijuana in plain view. This search was reasonable.

But Matos points to cases where the court held that officers may not open a *locked* trunk in an inventory search. *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980); *White*, 135 Wn.2d at 766. The evidence here, however, did not show that the trunk was locked.[1] Under these circumstances, Matos cannot show that if counsel had moved to suppress the evidence, there Is a reasonable probability that the trial court would have granted the motion, a necessary step for Matos to show prejudice. *See McFarland*, 127 Wn.2d at 337 n.4.

B. Failure to Object to Opinion Testimony

Matos also faults his counsel for not moving for a mistrial or requesting a curative instruction when Deputy Ditrich testified that Matos ran into him intentionally. He argues that the testimony denied him a fair trial because intent was a core issue of the assault charge.

We find that counsel's failure to ask for a curative instruction or mistrial was not deficient because Deputy Ditrich's testimony was admissible. Lay witnesses may "give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing ER 701). Here, Deputy Ditrich's comment that Matos intentionally ran right into him is based upon his rational perception that Matos lowered his shoulders in a football-type tackle and ran into him despite other unobstructed routes. Counsel

[1] Defense counsel asserted that the trunk was locked during his closing argument, but statements by lawyers are not evidence.

did not ineffectively represent Matos by failing to request a curative instruction.

IV. Sufficiency of the Evidence

Matos finally asserts that the State failed to prove that he possessed the marijuana found in the trunk. He reasons that because he was not the registered owner of the car, no evidence established that he constructively possessed the marijuana.

We measure the sufficiency of the evidence by asking whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). We draw all reasonable inferences in favor of the State and most strongly against the defendant. *Brown*, 162 Wn.2d at 428 (quoting *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006)). A claim of insufficiency admits the truth of the State's evidence. *Brown*, 162 Wn.2d at 428 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

To establish constructive possession, the prosecution had to prove that Matos had dominion and control over the marijuana. *See State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant's close proximity to the drugs alone is insufficient to establish constructive possession. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

Here, the evidence was sufficient for the jury to infer constructive possession. First, Matos was the driver of the vehicle and therefore had access to all its compartments. Second, he fled as the police tried to apprehend him, suggesting consciousness of guilt, and the jury could have reasonably concluded that the marijuana played a role in his flight. *See State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Matos's subsequent resistance and threatening of police officers supports this conclusion. Police also found oxycodone and $1,000 in cash in Matos's

pockets, from which a jury could reasonably find that he was involved with drugs. *See State v. Porter*, 58 Wn. App. 57, 61-62, 791 P.2d 905 (1990) (holding that proximity, possession of a large amount of cash, hostility toward police, and subsequent flight is sufficient to establish constructive possession). We find the evidence sufficient for the jury to convict Matos of possessing marijuana.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Penoyar, A.C.J.